

Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KING COUNTY, a Washington municipal  
corporation,

Plaintiff,

v.

TRAVELERS INDEMNITY COMPANY, *et*  
*al.*,

Defendants.

Case No. 2:14-cv-01957-MJP

**DECLARATION OF  
DAVID HOWENSTINE RE:  
PROVIDENCE WASHINGTON  
INSURANCE COMPANY'S  
OPPOSITION TO KING COUNTY'S  
MOTION FOR SUMMARY  
JUDGMENT ON BAD FAITH**

THE TRAVELERS INDEMNITY  
COMPANY, *et al.*,

Third-Party Plaintiffs,

v.

CONTINENTAL CASUALTY COMPANY,  
*et al.*,

Third-Party Defendants.

I, David W. Howenstine, declare as follows:

1. I make this declaration based on personal knowledge and I am familiar with the facts stated herein. I am over the age of 18 and I am otherwise competent to testify.

2. I am an attorney at Lane Powell and represent Defendant Providence Washington Insurance Company ("Providence") in this case. I have been actively involved in

1 discovery matters for this case.

2 3. Attached as **Exhibit A** is a copy of the “Learn about Cleanup” page on the  
 3 Lower Duwamish Waterway Group website, which is publicly available online at  
 4 [www.ldwg.org/learn.html](http://www.ldwg.org/learn.html) (accessed May 9, 2016). The Lower Duwamish Waterway Group  
 5 consists of the Port of Seattle, the City of Seattle, King County, and the Boeing Company. The  
 6 “Learn about Cleanup” page states:

7 Since 2000, the Lower Duwamish Waterway Group (LDWG) partners have  
 8 worked under a voluntary agreement with the U.S. Environmental Protection  
 9 Agency (EPA) and the Washington State Department of Ecology (Ecology) for  
 a coordinated investigation of the Lower Duwamish Waterway (LDW)  
 sediments.

10 4. Attached as **Exhibit B** is a copy of a letter dated June 13, 2013 from King  
 11 County Executive Dow Constantine to the U.S. Environmental Protection Agency (“EPA”),  
 12 along with an attached letter from King County to the EPA with King County’s Detailed  
 13 Comments on EPA Proposed Plan for the Lower Duwamish Waterway on the EPA’s proposed  
 14 plan on the Lower Duwamish Waterway Superfund Site. This declaration attaches only  
 15 excerpts from King County’s Detailed Comments. The letters and complete attachments are  
 16 publicly available online at the LDWG website at  
 17 [www.ldwg.org/Assets/FS/KingCounty\\_EPAProposedPlan\\_LDWComments.pdf](http://www.ldwg.org/Assets/FS/KingCounty_EPAProposedPlan_LDWComments.pdf) (accessed May  
 18 9, 2016). In its Detailed Comments on the EPA’s proposed plan, King County includes the  
 19 following comment and request for revision at page 14:

20 The County, City, Port and Boeing initiated the discussions with EPA and  
 21 Ecology to conduct a cleanup of the Waterway and voluntarily agreed to enter  
 22 into an Administrative Order on Consent with EPA and Ecology when, after an  
 23 agreement in principle was reached, the Department of Justice insisted that the  
 24 site be formally listed under CERCLA. The text should reflect this unique and  
 collaborative effort as it has bearing to the approach and the Early Actions. At a  
 minimum, the language should be modified by replacing “were issued” with  
 “volunteered to enter into.”

25 5. Attached as **Exhibit C** is a copy of the “King County’s long-standing  
 26 commitment to the Duwamish” page from King County’s website, which is publicly available  
 27 online at [www.kingcounty.gov/environment/wastewater/Duwamish-](http://www.kingcounty.gov/environment/wastewater/Duwamish-)

1 [waterway/Commitment.aspx](#) (accessed May 9, 2016). This page includes a Duwamish  
2 Waterway timeline that describes Metro's and King County's historical knowledge of pollution  
3 at the Lower Duwamish Waterway and their historical efforts to clean up and test for pollution.  
4 The timeline begins in 1958 and has regular entries throughout the 1960s, 1970s, 1980s, 1990s,  
5 and 2000s, including the following entry:

6 2000: Lower Duwamish Waterway Group forms to investigate Duwamish  
7 sediments: The Boeing Company, the City of Seattle, King County, and the Port  
8 of Seattle (the Lower Duwamish Waterway Group or LDWG) complete a  
voluntary agreement to begin investigation of the Lower Duwamish Waterway  
sediments, toward an ultimate waterway cleanup plan.

9 6. The original defendants in this case, Providence, Travelers, and Hartford,  
10 prepared a collection of initial discovery requests to King County, which included 26 requests  
11 for production. On May 20, 2015, Travelers served these discovery requests on King County.

12 7. On June 19, 2015, King County responded to the discovery requests and  
13 asserted numerous objections to production. Attached as **Exhibit D** is a copy of King County's  
14 objections and responses. Despite its numerous objections and assertions of privilege, King  
15 County did not produce a privilege log or otherwise identify the documents withheld. The only  
16 documents the County produced with its June 19, 2015 objections and responses were copies of  
17 insurance policies that had already been produced to defendants.

18 8. On July 2, 2015, the defendants scheduled a meet-and-confer with King County  
19 about its discovery objections and responses in an attempt to cooperatively resolve the  
20 County's objections. Although the County agreed to produce a limited number of additional  
21 documents, the County refused to withdraw the majority of its objections.

22 9. Since its initial response on June 19, 2015, the County has produced, on a  
23 rolling basis on June 23, 2015, August 11, 2015, and August 18, 2015, copies of  
24 communications between King County and the respective defendants, as well as a limited  
25 number of communications between the County and certain other insurers.

26 10. To date, however, the County has otherwise failed to produce other responsive  
27 documents requested in the discovery requests, including documents it stated would be

1 produced in its June 19, 2015 responses. Notably, the County has not produced any documents  
2 regarding its alleged costs and/or damages.

3 11. The County has also still not produced a privilege log.

4 12. On August 14, 2015, the Court denied King County's motion to bifurcate.

5 13. On August 17, 2015, the defendants followed-up with King County to request  
6 that the County withdraw its objections to discovery and promptly supplement its production  
7 based on the Court's ruling. On August 18, 2015, counsel for the County stated that the County  
8 was "revisiting" the discovery requests, but needed "to identify responsive documents and  
9 prepare and circulate a protective order" and that it would respond "in due course." The  
10 defendants again followed-up about the timing of the County's supplementation and whether  
11 there were categories of documents that it would still refuse to produce. I specifically  
12 requested that the County provide a date certain for the supplementation, explaining that "the  
13 County's pending motion for summary judgment makes it necessary for us to know more than  
14 that the County will supplement 'in due course' so that we can evaluate our options in  
15 responding to the County's motion." The County did not respond and did not circulate a draft  
16 protective order. Attached as **Exhibit E** is a copy of the e-mail exchange between the parties.

17 14. One of the primary alleged impediments to discovery in this case was the  
18 County's argument that the case should be bifurcated and its assertion that it had no obligation  
19 to produce documents or participate in discovery relevant to the defendants' claims and  
20 defenses until the Court ruled on its motion to bifurcate. Because the County refused to  
21 meaningfully respond to the defendants' discovery requests, the defendants have not yet had an  
22 opportunity to review potentially critical, undisclosed documents or to schedule or prepare for  
23 any depositions in this case.

24 15. Now that the Court has denied the County's motion to bifurcate and the Court  
25 approved a new case schedule and case management plan, it is expected that the County will  
26 withdraw its previous objections and provide meaningful responses to the defendants' initial  
27 discovery requests. If the County continues to refuse to respond, however, it is likely that the

1 defendants will move to compel and the Court will be called on to resolve any outstanding  
2 discovery dispute. Once the County produces documents or the discovery dispute is resolved  
3 by the Court, Providence will be able to determine whether follow-up written discovery is  
4 necessary and will be able to begin scheduling depositions of witnesses.

5 16. At the time King County filed its motion for summary judgment against  
6 Providence, however, the Court had not yet denied the County's motion to bifurcate and the  
7 County had not meaningfully responded to the defendants' discovery requests.

8 17. Before this Court could grant King County's motion for summary judgment,  
9 Providence should be able to complete its factual and expert discovery concerning the  
10 numerous disputed issues in this case. At a minimum, Providence should be permitted to  
11 obtain substantive responses to the initial discovery requests that were served in May 2015, to  
12 conduct follow-up written discovery as appropriate, and to conduct depositions of a 30(b)(6)  
13 representative of King County, of persons who handled the tender and post-tender  
14 communications, including John Bjorkman and possibly Jennifer Hillis, and of persons who  
15 have knowledge of the cleanups and related matters, including William Blakney, who filed a  
16 declaration in support of the County's motion for summary judgement but was not identified in  
17 the County's initial disclosures.

18 18. It is difficult to predict exactly what facts and evidence will be revealed through  
19 discovery, but the specific facts and evidence that Providence expects to uncover through  
20 written discovery and depositions include, but are not limited to, the following:

- 21 a. The circumstances that led to King County's decision to delay tender by 13  
22 years, including whether the County intentionally violated its cooperation  
23 obligations and deliberately failed to notify Providence so that it could exercise  
24 exclusive control without interference from any insurers;
- 25 b. The prejudice caused by King County's late tender and its handling of the  
26 matters;
- 27 c. The rates, amount, and reasonableness of fees and costs charged by King

County's attorneys, including K&L Gates, and any other representatives or consultants;

- d. King County's post-tender actions and unclean hands, including whether the County acted intentionally in an attempt to set up Providence for a bad faith claim in violation of its statutory good faith obligations;
- e. The alleged relationship between King County and Metro, including Metro's separate insurance program and any settlements under Metro insurance policies;
- f. Whether King County experienced any actual harm as a result of the alleged bad faith actions of Providence;
- g. Any selective tenders, settlements, and policy releases made by King County before its tender to Providence in July 2013;

19. As explained in Providence's opposition to King County's motion for summary judgment, these facts and discovery are essential to oppose summary judgment and weigh directly on the legal issues in dispute. Moreover, it is King County, not defendants, who are in possession of this information.

20. To date, the County refuses to provide counsel access to the document-sharing site or copies of any documents allegedly added at unknown dates. When I requested access to the document-sharing site, I was told that the County "expressly reserves all of its rights as to any claims of any kind arising out of Providence making these documents available to [me] or any other person." This unusual response suggested to me that King County would somehow attempt to hold me and/or Providence liable if I attempted to access the document-sharing site. My understanding is that Travelers received a similar response. Accordingly, the defendants requested the documents on the document-sharing site via discovery. King County has not produced any such documents. On July 27, 2015, the County stated that it had withdrawn all access to the document-sharing site.

21. Attached as **Exhibit F** are excerpts from the Verbatim Report of Proceedings of the August 11, 2014 hearing before this Court on King County's motion to bifurcate. These

1 excerpts include pages 1, 5-6, 13, and 44.

2 22. Attached as **Exhibit G** is a copy of the Memorandum of Agreement Between  
3 the Port of Seattle, the City of Seattle, and King County Regarding the East Waterway  
4 Operable Unit of the Harbor Island Superfund Site Supplemental Remedial  
5 Investigation/Feasibility Study, dated March 27, 2006. This Memorandum of Agreement was  
6 provided with King County's July 19, 2013 letter. This document was produced by the County  
7 and marked as KC\_Docs\_001425-1435.

8 23. Attached as **Exhibit H** is a copy of the Alternative Dispute Resolution  
9 Memorandum of Agreement, which governs the allocation mediation proceedings. This  
10 document was produced by the County and marked as KC\_Docs\_001242-1300.

11 24. Attached as **Exhibit I** is a copy of the Settlement Agreement between King  
12 County and the City of Seattle in the *City of Seattle v. The Boeing Company* lawsuit. This  
13 settlement was provided with King County's July 19, 2013 letter. This document was produced  
14 by the County and marked as KC\_Docs\_001500-1506.

15 25. Attached as **Exhibit J** is a copy of a Settlement Agreement and Release dated  
16 February 9, 1998. This settlement and release was entered into by King County and Continental  
17 Casualty Company, Phoenix Assurance Company of New York, Commercial Insurance  
18 Company of Newark, New Jersey, Pacific Insurance Company, and Transcontinental Insurance  
19 Company with respect to 13 insurance policies issued to Metro. This document was produced  
20 by the County and marked as KC\_Docs\_001051-1060.

21 26. Attached as **Exhibit K** is a copy of a Settlement Agreement and Release dated  
22 July 17, 1997. This settlement and release was entered into by King County and American  
23 Home Assurance Company, the Insurance Company of the State of Pennsylvania, Granite State  
24 Insurance Company, National Union Fire Insurance Company of Pittsburgh, PA., and New  
25 Hampshire Insurance Company with respect to 38 policies issued to Metro.

1 I declare under penalty of perjury under the laws of the United States that the foregoing  
2 is true and correct.

3 DATED: May 13, 2016.

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6 s/ David Howenstine  
David Howenstine  
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**CERTIFICATE OF SERVICE**

I, certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to:

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DATED: May 13, 2016.

s/ Kris Budigan

Kris Budigan